IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1462

DELAWARE REPUBLICAN STATE COMMITTEE, *et al.*,
Petitioners,

v.

B. WILSON REDFEARN, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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The petitioners, Delaware Republican State Committee, Eugene Bunting, Chairman, Basil R. Battaglia, Raymond T. Evans, Mary L. Sims, Alexander DeStephano, and Jane Baddorf, respectfully pray that a writ of certiorari issue to review the judgment order of the United States Court of Appeals for the Third Circuit entered in this proceeding on November 14, 1975.

OPINIONS BELOW

1. There is no published opinion of the United States Court of Appeals, Third Circuit, from which petitioners are now appealing. However, attached hereto, as Appendix A, is a copy of the Judgment Order issued by that Court.

2. The earlier opinion of the Court of Appeals, reversing and remanding, is published at 502 F.2d 1123 (1974).

3. The opinions of the United States District Court for the District of Delaware are published at 393 F.Supp. 372 (1975) and 362 F.Supp. 65 (1973).

JURISDICTION

The judgment of the Court of Appeals was entered on November 14, 1975. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the voluntary association of individuals at a major party's state political convention is a guaranteed freedom of the First Amendment of the Federal Constitution.

2. Whether the one man-one vote principle of *Baker v. Carr* has application to delegate representation at a major party's state political convention.

3. Whether the delegate apportionment formula projected for use at the Delaware Republican State Convention contains permissible deviations from mathematical equality and whether those deviations are

justified by some legitimate and rational interest of the Delaware State Republican Party.

4. Whether the selection of a state party's delegate apportionment formula for its state convention constitutes an internal political party deliberation calculated to serve party interests.

5. Whether the issues presented by this case involve justiciable questions subject to resolution by Federal Courts.

6. Whether there were viable judicial alternatives to the granting of declaratory relief against a state political party's internal rule affecting its convention delegation.

7. Whether the District Court had jurisdiction of this case under 28 U.S.C. § 1343(3) and (4), or otherwise.

8. Whether there was sufficient state action present in this case to justify the District Court's intervention into the internal affairs of a voluntary political association.

STATEMENT OF THE CASE

This petition results from a continuing controversy within the Delaware State Republican Party. Petitioners (defendants-appellants below) are the Delaware State Republican Committee, its chairman, members and certain persons who were permitted to intervene by the District Court. The respondents (plaintiffs-appellees below) are registered Republicans residing in New Castle County, Delaware, Republican State Convention District #2. Respondents initiated litigation in an attempt to compel changes in the delegate apportionment formula of the Republican State Convention.

Respondents filed their original complaint on December 1, 1972, in the United States District Court

for the District of Delaware alleging deprivation of equal voting rights under Title 42, Section 1983 of the U.S. Code. The complaint sought both declaratory and injunctive relief under 28 U.S.C. 2201 and 2202 and specifically an Order compelling the Delaware Republican State Committee to allocate delegates to the Republican State and National Conventions in a manner conforming to the principle of "one man, one vote." The District Court accepted jurisdiction under 28 U.S.C. 1343(3) and 1343(4) and the case was ultimately decided upon plaintiffs' motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure.

The complaint challenged the Constitutional validity of Rule 2 of the Republican State Committee. (The text of Rule 2 is set forth at Appendix B hereto.) Rule 2 provided for an allocation of 220 State Convention delegates in the following manner: 1) 120 delegates (54.5% of the total delegation) were allocated on the basis of 30 delegates to each of the four state convention districts and 2) the remaining 100 delegates (45.5% of the total delegation) were allocated on the basis of the percentage of the statewide Republican vote cast in certain specified prior elections.

Applicable Delaware statutes provide that candidates for particular state offices receiving more than 50% of the eligible delegate final polled vote would be certified to state election officials as the party candidate in the next general election. 15 Delaware Code §§3301, 3116. Other statutes provided that any candidate receiving 35% of the convention delegate final polled vote could be a candidate to run against the majority candidate in a direct party primary election, providing timely notice was given to the state election officials. 15 Delaware Code §§3116, 3107(a)(1).

Respondents also challenged the allocation formula by which the Delaware delegates and alternates to the Republican National Convention were selected. Historically, these delegates were allocated to the four state convention districts on the basis of three delegates and three alternates per district.

Respondents alleged a violation of the Equal Protection Clause of the Fourteenth Amendment as as the basis for relief. Respondents asserted that this voting strength had been unconstitutionally diluted in that their representation at the Republican State Convention and in the delegation to the Republican National Convention was not proportionate to the population, number of registered Republican or past Republican electoral strength in the second convention district.

The District Court granted plaintiffs' motion for summary judgment, finding that the existing delegate allocation formula (Rule 2) was violative of the Fourteenth Amendment's guarantee of equal protection. The District Court enjoined the Republican State Committee from engaging in its practice of allocating a portion of state convention delegates on the basis of equal number of delegates to each convention district and from the traditional practice of allocating Republican National Convention delegates on the convention district basis. The Court ordered the Delaware State Republican Committee to adopt a delegate allocation formula for the state convention, consistent with the "one man, one vote" principle and a similar order was directed to individual district committees. 362 F.Supp. 74-75.

An appeal was taken to the United States Court of Appeals, Third Circuit. A three-judge panel of the Court

of Appeals reversed the District Court's judgment and remanded for further proceedings. 502 F.2d 1123 (1974). The three judges filed separate opinions: an "Opinion of the Court" filed by Judge Gibbons, a concurring opinion filed by Judge Aldisert and a dissenting opinion filed by Judge Rosenn.

The "Opinion of the Court" first addressed itself to "The Effect of the District Court Order" (502 F.2d 1127-1128). Judge Gibbons held that in choosing to rule on the Delaware State Republican Party's own Rule, instead of the state statutes which give the rule the defacto force of state law, that the District Court may have unnecessarily intruded upon the state party's First Amendment right of association:

> "But the court's decision to let stand the challenged statutes but hold invalid the internal party rules raises quite serious first amendment issues . . . Many believe that party success in achieving statewide or national political power is intimately related to success in achieving such power in the local substructures of government. Thus the ability of any party in Delaware to organize itself on a district rather than an at large basis may be, or is believed to be, significantly related to its pursuit of the power to impose its policies upon government. The freedom to associate for such a pursuit is the heart of the right of association guaranteed by the first amendment." (502 F.2d 1127)

The opinion concluded:

> "The statute under which the state intrudes its action into the party continues to operate, but at the expense of the freedom of association of the party." (502 F.2d at 1128)

Judge Gibbons, speaking for the Court, reversed and remanded "... because the district court ... *did not weigh the highly relevant associational rights of the party.*" (502 F.2d 1123 at 1128) (emphasis added). Thus, the Court of Appeals clearly recognized and clearly instructed the District Court to recognize and weigh the First Amendment rights of the Delaware Republican Party.

The Court of Appeals also reversed and remanded because of the "three-judge court issue." Holding that the District Court had in effect improperly granted injunctive relief without convening a three judge court. Judge Gibbons instructed that on remand a three-judge court be convened if the plaintiffs continued their request for injunctive relief. The issue was subsequently mooted on remand as plaintiffs withdrew their request for injunctive relief. The short concurring opinion of Judge Aldisert contains no language indicative of any differences on the First Amendment issue between Judge Aldisert and the Opinion of the Court. Rather, Judge Aldisert articulates certain points of differentiation concerning the three-judge court issue. It is clear, therefore, that a majority of the division of the Court of Appeals was concerned with the failure of the District Court to consider petitioner's (defendants) First Amendment rights.

On remand, the District Court virtually ignored the clear intent of the Court of Appeals: consideration and weighing of the First Amendment rights of petitioners with respect to the Fourteenth Amendment claims of respondents (plaintiffs). 393 F.Supp. 372 (1975). Instead, the Court somehow concluded that it "... may not be bound to consider the issue raised by Judge Gibbons ..." (393 F.Supp. at 375), and thereafter considered the alternative to declaring Rule 2 unconstitutional. The District Court undertook a lengthy

recitation of Delaware state political and statutory history seeking to demonstrate that by declaring the ballot access statutes unconstitutional, no direct party primary would result. (393 F.Supp. 375-379) The District Court was apparently of the erroneous belief that the Court of Appeals' directive related only to possible questions of creating a direct Republican Party primary by holding state statutes unconstitutional. Such a ruling, the District Court correctly concluded, would not change the allocation of delegates to state party and national party conventions. Having thus partially ruled on the merits of the case, the Court thereupon reinstated its prior judgment.

The District Court's second judgment in this case suffers from precisely the same defects as the first: the Court did not weigh or consider the First Amendment association rights of the petitioners. The Court either ignored or fundamentally misinterpreted the opinion of the Court of Appeals, as Judge Gibbons clearly directed the District Court to consider and weigh various alternatives to sacrificing the First Amendment rights of the party. (502 F.2d 1128) Yet, the District Court considered only whether declaring state statutes unconstitutional would create a direct party primary. Nowhere does the District Court evidence any consideration or concern for the party's right to organize itself, to set its own goals, or to make political judgments on issues effecting elections and organizational strategy. In short, the question of the party's First Amendment rights was entirely ignored by the District Court.

Appeal from this second judgment was again taken to the Court of Appeals for the Third Circuit. Thereafter, a second panel of that Court, comprised of Judge Aldisert and two different judges, entered a Judgment

Order, without opinion, affirming the judgment of the District Court. This affirmance of the District Court's opinion, without even the minimal clarification of an opinion, establishes a ruling in this case that is inconsistent with a prior ruling of another panel of the Circuit in the same case. The resulting contradictions can serve only to obscure and cloud the issues present in this litigation.

The second panel opinion, does precisely what the Opinion of the Court in the first panel found so objectionable: it evidences no consideration whatsoever for the First Amendment association rights of the petitioners. The second appellate judgment denies to petitioners any opportunity for a full adjudication consonant with recent changes in the law on such vital issues as jurisdiction, standing, justiciability, state action, the rationality of the state convention formula, as well as the Delaware Republican Party's vital rights of association guaranteed by the First Amendment. Those errors may now only be cured by a granting of a writ of certiorari by this Court.

REASONS FOR ALLOWANCE OF WRIT

I.

A SIGNIFICANT CONFLICT EXISTS AMONG THE FEDERAL CIRCUITS ON THE ISSUE OF WHETHER PARTY NOMINATING CONVENTIONS SHOULD BE SUBJECT TO THE ONE MAN-ONE VOTE PRINCIPLE.

A review of case law since 1962 reveals a significant divergence among the Federal Courts on the issue of

the applicability of the one man-one vote principle to political party nominating conventions. As set forth in capsule form herein, there is simply no consensus among the circuits concerning this issue. The Third Circuit's Judgment Order, from which this appeal is taken, further confuses the state of the law on this issue, and certiorari should therefore be granted in order to finally resolve this important, and frequently reoccurring, issue.

In *Gray v. Sanders*, 372 U.S. 368 (1965), this Court expressly reserved the issue of whether the Equal Protection Clause of the Fourteenth Amendment requires that party nominating conventions conform to the one man-one vote principle.* Since that holding the federal courts have been unable to agree on this issue.

In *Irish v. Democratic-Farmer-Labor Party of Minnesota*, 399 F.2d 119 (8th Cir. 1968), *aff'g* 287 F. Supp. 794 (D. Minn. 1968), the Eighth Circuit held the one man-one vote requirement inapplicable to a state party convention which selected delegates to the national convention. Similarly, in *Smith v. State Executive Committee*, 288 F. Supp. 371 (N.D. Ga. 1968), a federal district court denied relief in a case filed against the Democratic State Executive Committee. Party members had alleged deprivation of equal protection in the selection of delegates to the national convention. The Court could find no precedent for judicial intervention in "the internal rules or management of a political party." *Id.* at 376. Most recently, the United States Court of Appeals for the District of Columbia

*372 U.S. at 378 n. 10; *see also Cousins v. Wigoda*, 419 U.S. at 483-84 n. 4 (1975).

held *en banc* that the Equal Protection Clause does not require the application of one man-one vote to the allocation of delegates to national political conventions. *Ripon Society, Inc. v. National Republican Party*, 525 F.2d 567 (1975), *cert. denied* ____ U.S. ____ (1976). The Court found that Fourteenth Amendment requirements are satisfied,

> ". . . if the representational scheme and each of its elements rationally advance some legitimate interest of the party in winning elections or otherwise achieving its political goals." (*Id.* at 586-587.)

To the contrary, a line of cases originating with *Maxey v. Washington State Democratic Committee*, 319 F. Supp. 673 (W.D. Wash. 1970), has held that the one man-one vote requirement applies to party nominating conventions.

In *Maxey* the District Court extended the one man-one vote standard established as to primary elections in *Gray v. Sanders, supra*, to the state party conventions, notwithstanding the Court's specific reservation of the issue in *Gray*. Indeed, the *Maxey* Court evidenced cognizance of the inconsistency its holding would create by finding itself compelled to explain away the holdings in *Irish* and *Smith*:

> "I agree that the one-man-one-vote principle must be applied at the precinct level, but insofar as *Irish* and *Smith* hold that this is the only level to which it applies I think those cases are inconsistent with the principles announced in *Reynolds* [v. Sims, 377 U.S. 533 (1964] and *Gray*." (319 F. Supp. at 680)

Maxey was followed in *Doty v. Montana State Democratic Central Committee*, 333 F. Supp. 49 (D. Mont. 1971), where one man-one vote was applied to a county committee that chose delegates to the national

convention and filled vacancies in the party's slate of candidates occuring between primary and general elections. Similarly, the Court of Appeals for the Second Circuit required a Republican Party Committee to conform to one man-one vote standards when it nominated candidates for local offices. *Seergy v. Kings County Republican County Committee*, 459 F.2d 308 (2nd Cir. 1972). In *Barthelmes v. Morris*, 342 F. Supp. 153 (D. Md. 1972), plaintiffs attacked an allocation of delegates to the national convention that distributed delegates equally by congressional districts. Their claim was that equal protection was denied them because the apportionment formula was based on population alone and not party strength. The Court, although dismissing the complaint for laches, noted that the cases, "differ in the applicable standards which must govern delegate selection processes. . . .," *Id.* at 158. The Court noted further that a substantial constitutional issue had been raised.

Thus, federal courts in the Eighth (*Irish v. Democratic-Farmer-Labor Party of Minnesota, supra*), Fifth (*Smith v. State Executive Committee, supra*), and District of Columbia (*Ripon Society, Inc. v. Republican National Committee, supra*) Circuits hold that the one man-one vote principle does not apply to party nominating conventions, while federal courts in the Ninth (*Maxey v. Washington State Democratic Committee, supra; Doty v. Montana State Democratic Central Committee, supra*) and Second (*Seergy v. Kings County Republican County, Committee, supra*) Circuits hold to the contrary. These cases indicate a clear and significant split of opinion within the meaning of U.S. Supreme Court Rule 19. Certiorari should therefore be granted to resolve this important question of federal law.

II.

THE DECISIONS BELOW FAILED TO RECOGNIZE THE FIRST AMENDMENT TO THE CONSTITUTION'S GUARANTEED FREEDOM OF ASSOCIATION TO POLITICAL PARTIES.

The delegate apportionment formula to be employed at the Delaware Republican State Convention was established by the Delaware Republican Party, seeking to achieve Delaware Republican objectives. The Supreme Court has frequently recognized the kinship of the freedoms of speech and of political association. See, e.g., *Kusper v. Pontikes*, 414 U.S. 51, 56-57 (1973); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958). This Court has declared that "[a]ny interference with the freedom of a party is simultaneously an interference with the freedom of its adherents." *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957).

The right of individuals to associate is protected by the First Amendment to the Constitution from interference by any branch of government, including the judicial branch. See *NAACP v. Button*, 371 U.S. 415 (1963); *Sweezy v. New Hampshire, supra*. Freedom to associate is a freedom to meet with others of one's choosing, to organize and to engage in political activity. The freedom to engage in political activity has often been cited as that goal which all other constitutionally guaranteed liberties seek to preserve. *Hadnott v. Amos*, 394 U.S. 358 (1969); *New York Times v. Sullivan*, 376 U.S. 254 (1964); *NAACP v. Alabama, ex rel. Patterson, supra;* Brennan, *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 Harv. L. Rev. 1 (1965).

The Supreme Court has recognized that to make the right of political association meaningful, the First Amendment must necessarily protect the activities of political parties from interference. Political parties are the common vehicle of political activity in this country and their ability to operate independently of governmental intrusion results in the successful operation of the American political system. *NAACP v. Button*, 371 U.S. 415 (1963), *Rosario v. Rockefeller*, 458 F.2d 649 *Rosario v. Rockefeller*, 458 F.2d 649 (2nd Cir. 1972).

Political decisions are generally made on the basis of that which seems best calculated to strengthen the political party and to advance its interests. That process, itself, deserves the protection of the Federal Constitution, as much as, if not more than, the concomitant rights of speech and assembly. The guaranteed freedom of speech and assembly becomes mute and nonexistent if they do not include with them the right to effect change through political process.

The Third Circuit Court of Appeals in this case, 502 F.2d 1123 (1974), recognized this principle when it reversed the District Court's decree on the basis that the decree unduly interfered with the party's right of free association, The Court stated:

> "If a given party chooses to organize by districts, *but to allocate delegate strength to a district in which it has fewer numbers but a greater opportunity to achieve the practical advancement of the political ideas for the pursuit of which the association was formed*, state action which frustrates that choice is highly suspect."
> (502 F.2d at 1127-28) (emphasis supplied)

The implications of this reasoning are clear. No court can, consistent with the right of free association guaranteed by the First and Fourteenth Amendments, interfere with politically-oriented determinations of

political strength to different segments of the electorate.

Although an ancient maxim prescribes that "for every wrong the law prescribes a remedy", petitioners herein were denied their mandated remedy by the District Court upon remand. As is set out in the Statement of the Case, the District Court, on remand, ignored the Court of Appeals' instructions and, compounding that error, a new panel of the Court of Appeals affirmed the District Court's nonaction, thereby leaving the state of the law on this question in the Third Circuit in a confused and inexplainable state. The confusion, simply stated, was that two separate panels on the Third Circuit Court of Appeals ruled differently from one another in the same case on the same issues. Legal confusion on the issues presented in this case, as was shown earlier in this petition, is not exclusively restricted to the Third Circuit, but rather is national in scope. A circumstance that only a grant of certiorari and a definitive opinion of the Supreme Court can cure.

In *Ripon Society, Inc., et al v. National Republican Party and Republican National Committee, supra*, an en banc panel of the U.S. Court of Appeals of the District of Columbia Circuit directed themselves to the question of the First Amendment's application to a gathering of individuals at a national political convention. Petitioners are unable to elucidate a justifiable rationale which distinguishes the First Amendment's guaranteed right of association on a national basis to that of a state basis. The Ripon court commented succinctly on this issue stating:

> "It is urged that this convention delegate apportionment formula represents nothing more than an effort by party members from strongly

> Republican states to perpetuate their control. But it seems to us that the First Amendment protects their power to do precisely that. The Party could have chosen a delegate allocation scheme calculated to broaden its base, by giving special influence to delegates from States where the party is weak. Instead it appears to have chosen to consolidate its gains in states where it has been strong. We are not about to hold that this is an irrational way to seek political success." (525 F.2d at 588)

Concluding its discussion of the First Amendment, the en banc panel of the D.C. Circuit in *Ripon* stated:

> "To the extent that voting rights are offset by the First Amendment rights exercised by the Party in choosing the formula it did. We must emphasize that this is only true because the formula rationally advances legitimate party interests in political effectiveness. The same might not always hold true. There are no racial or other invidious classifications here." (Id.)

Respondents herein have never maintained below nor is any evidence available to support an argument that the Delaware Republican convention formula contains racial or other invidious classifications. Given that consideration, one is justified in questioning why the First Amendment to the Federal Constitution appears to have one meaning in Washington, D.C. (and elsewhere) and an opposite meaning in the Third Circuit. The same argument unsuccessfully advanced by the Ripon Society in the Ripon case was rejected by the D.C. Circuit, yet erroneously adopted by the District Court on remand in this case . . . and still later, accepted by a second panel of the Third Circuit Court of Appeals.

III.

INTERNAL POLITICAL PARTY DELIBERATIONS AND CONCLUSIONS CALCULATED TO SERVE PARTY INTERESTS CONSTITUTE LEGALLY NON-JUSTICIABLE CONTROVERSIES.

On remand, the District Court should have applied the traditional principle of judicial non-interference in political party affairs and should have refused to adjudicate the alleged malapportionment of delegates to the Delaware Republican State Convention. Respondents assert that justiciability of the subject matter of this litigation on the basis of the decision held in *Baker v. Carr*, 369 U.S. 186 (1962) and the subsequent reapportionment cases. The *Baker* landmark decision stresses the "need for a case by case inquiry" into each subsequent litigation for a determination of justiciability. *Baker* does not pronounce justiciability for all political questions. Indeed, since 1962, the recent trend by Federal Courts has been to restrict rather than broaden the *Baker* principle.

In *Baker*, the Court found that the one man-one vote principle, as part of the "well developed and familiar" standards under the Equal Protection Clause of the Fourteenth Amendment, provided a judicially discoverable standard for determining whether a popularly elected state legislature was properly apportioned. But, as the D.C. Court of Appeals recognized in *Georgia v. National Democratic Party*, 447 F.2d 1271 (1971) cert. den. 404 U.S. 858 (1971), a population-based, one man-one vote principle is an "inappropriate test of representation in the framework of national politics where parties compete for membership." (447 F.2d at

1278-79). On the basis of this analysis, the D.C. Circuit rejected a complaint that delegates to the national party conventions were not allocated among the states according to population.

The earlier Court of Appeals decision in this case recognized the legitimacy of political party deliberations for party interests as a purely political function. The decision of what formula to best employ in allocating delegates to a party's state convention involves questions of how best, "to achieve the practical advancement of the political ideas for the pursuit of which the (party) was formed." *Redfearn v. Delaware Republican State Committee*, 502 F.2d 1123, 1127-28 (3d Cir. 1974). Resolution of these internal party matters are best reserved to the parties themselves.

Federal Courts have consistently refused to rule upon cases involving the internal political controversies of political parties. Commencing with Chief Justice Marshall's landmark opinion in *Marbury v. Madison*, 1 Cranch 137, 2 L.Ed. 60 (1803), and continuing to *O'Brien v. Brown, Keane v. National Democratic Party*, 409 U.S. 1 (1972), and the Supreme Court's denial of certiorari in *Ripon Society v. Republican National Committee, supra*, in 1976, the Judicial Branch of the Federal Government has traditionally avoided political controversies.

In its opinion in *O'Brien* and *Keane*, the Supreme Court commented upon the "absence of authority supporting the action of the Court of Appeals in intervening in the internal determinations of a political party . . ." The Court recognized the importance of this doctrine and noted:

> ". . . No case is cited to us in which any Federal Court has undertaken to interject itself into the deliberative processes of a national political convention; no holding of the Court up to now gives support for judicial intervention in the circumstances . . . involving as they do relationships of great delicacy and *essentially political in nature*." 409 U.S. at 4. (emphasis added)

The *O'Brien* case, while not directly contesting the full delegate selection formula of the entire convention, focuses on the delegate allotment of two of the fifty states. However, the relief sought by the *O'Brien* plaintiffs was couched in Equal Protection claims (as is respondents herein) and they alleged a dilution of voting rights (as do respondents herein) and the case resulted from a refusal of a majority of the delegates present at the convention to adopt the position of the moving litigants (as was the case with the Respondents herein). Faced with the necessity of ruling, lest the 1972 Democratic National Convention be enjoined and unable to nominate a candidate, the Supreme Court upheld the jurisdiction and justiciability questions, but resolved the merits by letting the convention itself decide its own internal party questions. Until the Supreme Court's decision in *Cousins v. Wigoda*, 419 U.S. 477 (1975) and its denial of certiorari in *Ripon, supra*, the *O'Brien* decision was the most recent Supreme Court ruling in this area. It upheld the tradition of judicial restraint on ruling upon political matters and specifically, where political party convention decision-making questions are raised. *O'Brien* is most relevant to this case.

While *O'Brien, Wigoda* and *Ripon* all involve the application of justiciability to a national party's political convention, no rational distinction exists in the law to apply a different standard of justiciability to a state party's political convention. Both constitute a

voluntary association of individuals for a stated political purpose of formulating political decisions and strategies calculated to advance political goals and objectives. Unlike *Baker*, any alleged malapportionment resulting from that voluntary association does not produce unequal representation of elected state officials to their individual constituencies.

The *Baker* reasoning, while sound as applied to the election process of state officials, is wanting when attempted to be analogized to voluntary gatherings of individuals for political purpose, whether or not that voluntary association is national or local in scope. The one man-one vote standard was found to be inapplicable in *Irish v. Democratic-Farmer-Lobor Party of Minnesota*, 399 F.2d 119 (8th Cir.), which held that a state party may select national convention delegates through a malapportioned state convention system. *Smith v. State Executive Committee*, 288 F.Supp. 371 (N.D. Ga. 1968) holds similarly to *Irish*. The third Circuit, in 1965, seemingly applied a different rule of reason to the issue of justiciability in questions of this type, *Lynch v. Torquato*, 343 F.2d 370 (3d Cir. 1965), ruling that the one man-one vote standard was inapplicable to selection of a state party's county committee. These and other cases speak to the recognition of judicial restraint in litigation involving internal party questions.

Petitioners reassert that the deliberations and conclusions reached by the Delaware Republican State Committee determining the delegate apportionment formula for the Delaware Republican State Convention constitute internal political deliberations by individuals voluntarily associating themselves into the political process. That undertaking by those individuals does not

differ in form or in substance from that undertaking of the individuals in *O'Brien, Ripon, Irish, Smith* or *Lynch*. Judicial restraint is exercised in those matters and should likewise have been applied in this case.

In 1975 the Supreme Court addressed issues related to this case in the case of *Cousins v. Wigoda, supra*. At the close of its opinion in *Cousins*, 95 S. Ct. at 549, the Court quoted from its earlier decision in *O'Brien* (409 U.S. at 4) in saying that, "the convention itself (was) the proper form for determining intra-party disputes as to which delegates (should) be seated." It is clear, of course, that the present case does not involve a national political convention nor a delegate seating contest. However, *Cousins* stands as a very strong decision committing basic decision-making authority about the make up of a political convention to the political party hosting the convention. The opinion relies heavily upon freedom of association of individuals in the political-decision making process. *Cousins* lends support to many aspects of Petitioner's position in this case: that convention delegate decisions are political decisions, made by party people in the exercise of freedom of association; that such decisions are self-policing and self-conforming to the rule of reason and rationality by virtue of the political process itself. That process requires, if it is to be successful, broad appeal and responsiveness. Without success, a political party will not survive.

It may be that the *Cousins* decision indicates the Court's view that if the political convention system is to remain effective—and it has been a rather good system which has evolved, and no one has clearly shown that there is a better system for our conditions—the Court must continue to grant wide

powers to the Convention itself in providing for the selection of delegates. If it does not do so, it will exacerbate the risk that intra-party factional disputes will develop, and these will often be presented to courts at the last minute with considerable potential for disruptive effect on the whole system, and, indeed with greater adverse effect on public confidence in the system than is warranted by the substance of the particular detailed questions which are raised.

When the Supreme Court of the United States denied the Ripon Society's writ of certiorari in *Ripon v. RNC, supra,* resulting from an adverse decision against the Ripon Society, rendered by an en banc panel of the U.S. Court of Appeals for the District of Columbia Circuit exercising judicial restraint, the Supreme Court reinforced the logic inherent in recognition of non-justiciability issues.

The opinion of the first panel of the Third Circuit Court of Appeals in this case 502 F.2d 1123 (1974) recognizes the overlapping problems of this litigation in the First Amendment and justiciability. The panel's instructions to the District Court on remand were not carried out and, as indicated earlier, the second panel of the Third Circuit Court of Appeals failed to recognize that error. Only through granting of this writ may these petitioners be assured that these relevant, and indeed controlling, issues associated with this litigation will be judicially determined.

CONCLUSION

The decision below conflicts with a prior decision of the same appellate court in this case, and leaves the law on convention delegate apportionment in confusion

within the circuit and in apparent conflict with recent decisions in other circuits. The decision below ignores the First Amendment rights of petitioners.

For the reasons stated above, petitioners respectfully request that the Court grant this Opinion for *certiorari.*

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

– – –

No. 75-1588

– – –

B. WILSON REDFEARN, et al.

v.

DELAWARE REPUBLICAN STATE
COMMITTEE, et al.,
Defendants

BASIL R. BATTAGLIA, et al.,
Intervening Defendants,

DELAWARE REPUBLICAN STATE
COMMITTEE, et al.
Defendants and Intervening
Defendants,

Appellants.

– – –

Appeal from the United States District Court
for the District of Delaware
(D.C. Civil Action No. 4528)

– – –

Submitted Under Third Circuit Rule 12(6)
November 14, 1975
Before: ALDISERT, HUNTER and GARTH,
Circuit Judges.

– – –

JUDGMENT ORDER

After considering the contentions presented by the appellants, (1) that the majority of the court when these proceedings were previously before us at 502 F.2d 1123 did find that the district court's decision intruded upon the appellants' First Amendment right of association and there were viable alternatives to such decision and (2) that the district court on reversal and remand may not substitute its own interpretation of a statutory scheme for that given by this court,

And the courthaving concluded that the majority members of the court at 502 F.2d 1123 agreed only that a challenge to the internal rules of the Republican State Committee of Delaware for the allocation of delegate seats in that party's state convention which challenge requested injunctive relief thereby requiring the convening of a three-judge court, and this court recognizing that neither Judge Gibbons nor Judge Aldisert reached the merits of the controversy, it is

ADJUDGED AND ORDERED that the judgment of the district court be and the same is hereby affirmed.

Costs taxed against appellants.

BY THE COURT,

/s/ Ruggero J. Aldisert
Circuit Judge

Attest:

/s/ Thomas F. Quinn
Thomas F. Quinn, Clerk

DATED: NOV 14 1975

APPENDIX B

Delaware Republican State Committee, et al.

Rule 2

The State shall be divided into four (4) Convention Districts as follows: The City of Wilmington shall be known as the First Convention District: New Castle County, outside of the City of Wilmington, shall be known as the Second Convention District; Kent County shall be known as the Third Convention District; and Sussex County shall be known as the Fourth Convention District. The Republican State Convention shall consist of two hundred and twenty (220) delegates, with fifty-five (55) percent of the delegates being distributed equally among the four (4) Convention Districts and forty-five (45) percent on the basis of Republican vote. The distribution shall be made in the following manner: one hundred and twenty (120) delegates shall be distributed on the basis of thirty (30) delegates to each Convention District; one hundred (100) delegates shall be distributed among the Convention Districts on the basis of one (1) delegate for each one (1) percent of the Statewide Republican vote which was cast in each Convention District in the last Presidential election. The Republican vote shall be determined by averaging the vote for the Republican Candidates for State Treasurer and for State Auditor. The State Committee, at its first meeting following each Presidential election, shall fix the number of delegates for each Convention District pursuant to the formula set forth above.